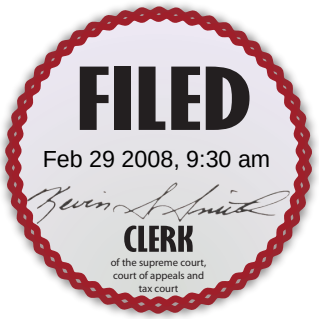

ATTORNEY FOR APPELLANT:

MARK A. DABROWSKI
Deputy Public Defender
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOSE TINDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0708-CR-706
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0612-FC-205

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jose Tinder ("Tinder") appeals his conviction for Resisting Law Enforcement, as a Class D felony.[1] We reverse.

Issue

Tinder raises three issues, one of which we find dispositive: whether there was sufficient evidence to support his conviction for Resisting Law Enforcement.

Facts and Procedural History

In the early morning of December 20, 2006, a citizen reported to police an attempted break-in at the Grocery Sack store in Kokomo, Indiana. The caller provided a description of the individual and vehicle that he witnessed driving away from the store.

That night, Kokomo Police Detective Shane Melton ("Detective Melton") was working undercover in plain clothes and wearing a police badge approximately three and one half inches by three inches in size. He was driving in his unmarked police car, which did not have any sirens or emergency lights, when he heard the description of the vehicle on his police radio. Shortly thereafter, Detective Melton observed a vehicle pass him on the road that he believed matched the description provided by dispatch. He waited for a few seconds and turned around to follow the vehicle. Eventually, the suspect vehicle turned down an access road, heading south, and stopped on the east side of a Low Bob's store. To avoid suspicion, Detective Melton continued driving a short distance to the next stoplight, all the while watching the other vehicle in his rearview mirror. A man exited the suspect vehicle and threw an object at the window of the Low Bob's store.

Detective Melton immediately turned onto the cross street, as he called in a break and enter in progress, and cut through a Wendy's parking lot that led to the Low Bob's parking lot. As the unmarked police vehicle approached, the man ran to his car and drove past Detective Melton's oncoming vehicle on the right, passenger side. As Detective Melton maneuvered his vehicle to pursue the suspect vehicle, a marked police vehicle, driven by Officer Michael Vautaw ("Officer Vautaw"), arrived and took the lead in the pursuit with his vehicle's emergency lights engaged. The suspect vehicle eventually ran off the road, crashed through a corn silo and was finally stopped by hitting a farm fence and brush. Tinder was eventually found by police approximately fifty yards from the wrecked vehicle.

The State charged Tinder with Resisting Law Enforcement, as a Class D felony, Operating a Vehicle While Intoxicated, as a Class A misdemeanor,[2] and two counts of Attempted Burglary, as Class C felonies.[3] The State later filed another count of Attempted Burglary, as a Class D felony. The charging information for the count of resisting law enforcement read in relevant part that:

> Jose Tinder did knowingly or intentionally flee from Shane Melton, a law enforcement officer, after said officer identified himself by visible or audible means and visibly or audibly ordered said defendant to stop and in committing said act the defendant used a vehicle . . .

Appellant's Appendix at 17 (emphasis added).

Upon a motion by Tinder, the trial court dismissed one count of Attempted Burglary prior to trial. After the State presented its case-in-chief at the jury trial, the State dismissed

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[1] Ind. Code § 35-44-3-3(a)(3); I.C. § 35-44-3-3(b)(1)(A).
[2] Ind. Code § 9-30-5-2.
[3] Ind. Code § 35-43-2-1.

the charge of operating a vehicle while intoxicated, and Tinder moved for directed verdicts as to the remaining charges. The trial court granted the motions as to the two counts of attempted burglary, but denied the motion as to the count for resisting law enforcement. The jury found Tinder guilty of resisting law enforcement, as a Class D felony. Tinder was sentenced to two years in prison.

Discussion and Decision

On appeal, Tinder contends that the State failed to sufficiently prove that he committed resisting law enforcement, because Detective Melton failed to identify himself as a law enforcement officer and failed to order Tinder to stop. In addressing a claim of insufficient evidence, we do not reweigh the evidence nor do we reevaluate the credibility of witnesses. Rohr v. State, 866 N.E.2d 242, 248 (Ind. 2007), reh'g denied. We view the evidence most favorable to the verdict and the reasonable inferences therefrom and will affirm the conviction if there is substantial evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. Id. "Nevertheless, evidence of guilt of substantial and probative value, as required to affirm a conviction, requires more than a mere scintilla of evidence. Evidence that only tends to support a conclusion of guilt is insufficient to sustain a conviction, as evidence must support the conclusion of guilt beyond a reasonable doubt." Whitaker v. State, 778 N.E.2d 423, 425 (Ind. Ct. App. 2002) (citing Short v. State, 564 N.E.2d 553, 557 (Ind. Ct. App. 1991)), trans. denied. Circumstantial evidence must do more than merely tend to arouse suspicion of guilt in order to support a conviction. See Morrow v. State, 699 N.E.2d 675, 677 (Ind. Ct. App.

1998).

For the State to convict Tinder of resisting law enforcement, as charged, it was required to prove that Tinder fled by vehicle from Detective Melton, a law enforcement officer, after Detective Melton had, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered Tinder to stop. See Ind. Code § 35-44-3-3(a)(3) and (b)(1)(A). Both a police officer's identification and his order to stop may be accomplished by acts visible to the defendant. Cole v. State, 475 N.E.2d 306, 309 (Ind. 1985). "Additionally, while not clear from the statute, caselaw clearly states that the person being arrested had to, at least, 'have reason to know' that the person he was dealing with is an officer." Stack v. State, 534 N.E.2d 253, 255 (Ind. Ct. App. 1989).

Tinder argues that there was insufficient evidence as to Detective Melton identifying himself as law enforcement and whether he ordered Tinder to stop. The State contends that the evidence is sufficient because it may be reasonably inferred that Tinder noticed Detective Melton's badge when the two vehicles passed close by, constituting visible identification. Regarding the required order to stop, the State contends that the evidence that Detective Melton drove to Tinder's location, stopped near him, made a U-turn, and then chased after Tinder's car constituted a visible order to stop. The record is clear that Detective Melton did not speak to or shout at Tinder, and that his car was not equipped with a siren. Thus, we are left with the question of whether Detective Melton had identified himself as law enforcement and ordered Tinder to stop by visible means.

There are few cases that involve similar facts of an undercover officer in civilian clothing and driving an unmarked car while apprehending a suspect. In Stack v. State, the undercover officer was in plain clothes with his badge on his belt and his gun under his jacket, both hidden from view. Stack, 534 N.E.2d at 255-256. This Court held that the evidence was insufficient to sustain a conviction for resisting law enforcement because the undercover officer never identified himself as a police officer when speaking with the defendant nor were there any visible means identifying him as an officer. Id. at 256.

In Battle v. State, Officer Baldini approached a suspect in the afternoon while dressed in civilian clothes with a badge around her neck on a chain and driving an unmarked vehicle. Battle v. State, 818 N.E.2d 56, 57 (Ind. Ct. App. 2004). She drew her weapon when she was within 2 to 3 feet of Battle, holding out her badge and shouting: "Stop. I'm the police. Don't run." Id. at 58. Battle turned and looked back at Officer Baldini before rapidly pedaling away on a bike. Id. On appeal, this Court held that this evidence was sufficient to support Battle's resisting law enforcement conviction because Officer Baldini identified herself by both visible and audible means while standing only a few feet from Battle, who turned and looked at the officer before riding away. Id.

Here, the only indicia that Detective Melton was an officer was his police badge that was approximately three and one half inches by three inches in size. Detective Melton testified that he had his badge in a black case in the clear sleeve, which presumably hung on a lanyard or chain, around his neck. Across the top of the black case was "Kokomo Police." Trial Transcript at 72. Had Tinder and Detective Melton approached each other in person,

this badge may have been sufficient visible means for Detective Melton to identify himself as an officer. However, here there was no personal contact between the plain-clothes officer and Tinder. Rather, the closest Tinder came to Detective Melton was when their moving cars passed one another on the passenger sides of their respective vehicles as Tinder maneuvered his car out of the Low Bob's parking lot. Detective Melton was driving an unmarked police vehicle that did not have emergency lights or a siren. With the cars passing each other on the passenger side, this would place a distance between the two men of at least several feet. Furthermore, this occurred at approximately 12:30 a.m. Additionally, there is no direct evidence that Tinder saw Detective Melton's badge.

This evidence is insufficient to support the conclusion that Tinder had a reason to know that the operator of the vehicle he was passing was a police officer. There were no visible means by which Detective Melton identified himself as a police officer to Tinder. His car did not have any police decals nor did it have any emergency lights or sirens.[4] He was not wearing a police uniform. The only evidence presented for identification purposes is the circumstantial evidence that Detective Melton was wearing his badge. Without more, this circumstantial evidence that Detective Melton was wearing a badge while Tinder drove past Detective Melton's moving car on the passenger side at night does not support a conclusion of guilt beyond a reasonable doubt that Tinder knowingly fled from Detective Melton, a law enforcement officer.

Our conclusion is dictated by the fact that Tinder was charged with resisting law

enforcement as to Detective Melton rather than Officer Vautaw. The evidence presented indicates that Officer Vautaw was driving a marked police vehicle and engaged his vehicle's emergency lights in his pursuit of Tinder's vehicle. The pursuit by Officer Vautaw lasted a couple of minutes before Tinder's vehicle left the roadway. This evidence demonstrates that Officer Vautaw identified himself as law enforcement and order Tinder to stop by visible means and that Tinder did not comply. Detective Melton even testified that he permitted Officer Vautaw to lead the chase because Detective Melton's vehicle obviously did not have lights or sirens to communicate to Tinder to stop. Had the State charged Tinder with resisting law enforcement as to Officer Vautaw, there would have been sufficient evidence to support a conviction. However, due to the manner in which the State charged Tinder, we are bound by the facts alleged in the charging information.

Reversed.

NAJAM, J., and CRONE, J., concur.

[4] In his testimony, Detective Melton stated: "As I turn I go ahead and stop so that Vautaw can take the lead because obviously I don't have lights and sirens to get him to stop." Trial Transcript at 82.